BRACKETT & LUCAS
COUNSELORS AT LAW
19 CEDAR STREET
WORCESTER, MASSACHUSETTS 01609
508-799-9739
Fax 508-799-9799

GARY S. BRACKETT
ELAINE M. LUCAS
JUDITH A. PICKETT
JAMES T. MASTERALEXIS
STEVEN C. FLETCHER*
ELLEN CALLAHAN DOUCETTE
DONNA GORSHEL COHEN
HEATHER C. WHITE
*Also Admitted in ME and CO

WINCHESTER OFFICE
165 WASHINGTON STREET
WINCHESTER, MASSACHUSETTS 01890
781-729-1500
Fax 781-729-5444

October 11, 2006

Kathleen Healy, Chair
Community Preservation Committee
Town of Westford
55 Main Street
Westford, MA 01886

RE: Questions Regarding Use of East Boston Camps Property

Dear Ms. Healy:

You requested that this office provide a legal opinion regarding five (5) questions your committee had about use of the East Boston Camps property. We respond as follows to those five (5) issues:

1. **What legal restrictions were placed on the property at the time of the purchase?**

A Conservation Restriction running to the Westford Land Preservation Foundation, Inc. was placed on the property when it was purchased by the Town from the Isabel F. Hyams Fund, Inc. The Town holds title to the underlying fee interest. The Conservation Restriction states that it is for the purpose of conservation, protection of water recharge areas, active and passive public recreational use, operation of an existing camp for outdoor and environmental education and possible siting of a future municipal water supply well. The Conservation Restriction also provides that the Town of Westford Master Plan, as it may be amended, may regulate the activities and uses on the premises as long as such uses are consistent with the Conservation Restriction.

In addition, the Town retained the right to promulgate rules and regulations governing permitted activities and uses of the premises and may suspend activities and uses when the Town determines that they are not consistent with the purposes of the Conservation Restriction. Regarding the use of the camp areas, no expansion of the camp or educational structures may be done without the approval of the holder of the Conservation Restriction, the Foundation.

2. **How does the State Procurement Law apply to the leasing or use of the East Boston Camps property by third parties?**

Mass. Gen. Laws c. 30B, §16 requires that whenever a governmental body leases, rents or sells real property the value of which exceeds twenty-five thousand dollars ($25,000.00), it must issue a Request for Proposals. When determining the value, the Town must use procedures "customarily accepted by the appraising profession". It is the value of the leasehold not the amount of rent charged that is the relevant figure.

The purpose of the requirement that municipal property must be bid is to make certain that public property is leased through honest methods, to prevent favoritism and to obtain the most favorable price for the municipality; the end goal is to "treat all persons equally". Mangano v. Town of Wilmington 51 Mass. App. Ct. 857 (2001) I am enclosing two (2) Inspector General opinion letters which address the issue of the twenty-five thousand dollar ($25,000.00) threshold, and the procedures to be followed when deciding to rent out Town property for a specified public purpose. When determining the value of the lease, it is the fair market value based on comparable rentals and not the actual rental amount which must be calculated. You should also be aware of the following:

a. Mass. Gen. Laws c. 40, §3 allows the Board of Selectmen to lease space in a public building for not more than ten (10) years; it also requires a Town Meeting vote for transfer of an interest in land by the Board of Selectmen.

b. Mass. Gen. Laws c. 7, §40J mandates that the town file a disclosure statement with the Commonwealth (DCAM) listing all persons leasing space.

c. Mass. Gen. Laws c. 30B, §16(a) requires that before renting a property the governmental body must declare the property "available for disposition and . . . specify the restrictions, if any, that it will place on the subsequent use of the property."

There are instances when a third party's use of the property would not be deemed a lease but would be more appropriately characterized as a license. In order to qualify as a license, the use must be non-exclusive, terminable at will and not assignable.

3. **How the Americans with Disabilities Act applies to the property, and what the effect of improvements or renovations of the existing structure would have on the application of the Americans with Disabilities Act?**

The Americans with Disabilities Act ("ADA") is set forth in 42 U.S.C. §12101 et seq. and prohibits discrimination against persons with disabilities. The applicable requirements for compliance with the ADA depend on the type of entity operating a particular facility.

"Public entities", including local governments, are required to comply with Title II of the ADA. 42 U.S.C. §12131. The regulations promulgated to implement Title II require public entities to comply with a standard of "program accessibility" which is discussed below.

"Public accommodations" are required to comply with Title III of the ADA. 42 U.S.C. 12181. "Public accommodations are defined as certain, specified private entities, such as places of public gathering; places of lodging; and places of recreation, such as parks and golf courses, whose operations affect commerce. The regulations promulgated to implement Title III require public accommodations to comply with a standard of "barrier removal", which is also discussed below. "Private clubs" are exempt from the requirements of Title III. The ADA adopts the definition of "private club" set forth in the Civil Rights Act of 1964. Generally, an entity will be considered a "private club" where members exercise a high degree of control over club operations; the member selection process is highly selective; substantial membership fees are charged; the entity is operated on a non-profit basis; and

the entity was not founded specifically for purposes of avoiding compliance with the Federal civil rights laws. Private clubs lose their exemption from the ADA to the extent that they are used by non-members as places of public accommodation.

Title II: Public Entities

Pursuant to Title II of the ADA, once a local government occupies a facility, it must make all programs accessible to persons with disabilities, except where to do so would result in a fundamental alteration in the nature of the program or "undue financial and administrative burdens". A local government must enable persons with disabilities to participate in and benefit from services, programs and activities in all but the most unusual cases. There are many methods of achievement of "program accessibility", and building alteration is not required unless there is no other feasible way to make the program accessible. For example, a local government may comply with the program accessibility requirement through delivery of services at alternate accessible sites, redesign of equipment, or assignment of aides to beneficiaries.

If a local government alters an existing building or constructs a new building, the alteration or construction must comply with certain design standards. Local governments may choose between two options of design standards: the Uniform Federal Accessibility Standards ("UFAS") and the ADA Accessibility Guidelines for Buildings and Facilities ("ADAAG").[1]

Title III: Public Accommodations

Unlike Title II, Title III requires removal of architectural barriers from existing facilities if such barrier removal is "readily achievable". "Readily achievable means "easily accomplishable and able to be carried out without much difficulty or expense". The ADA sets forth specific factors to be considered in determining whether an action is readily achievable. 42 U.S.C. 12181. The "undue burden" standard in Title II is intended to be significantly higher than the "readily achievable" standard in Title

[1] If the ADAAG is chosen, public entities are not entitled to the elevator exemption set forth therein.

Thus, public accommodations have a lower threshold to overcome in determining whether any action must be taken with respect to existing facilities. On the other hand, if removal of an architectural barrier is readily achievable, an architectural barrier must be removed from an existing building without regard to whether accessibility may be achieved through other means. Only when architectural barrier removal is not readily achievable may the public accommodation employ other means to achieve accessibility and, in fact, the public accommodation would then be required to make its goods and services accessible through other means, provided that such means are readily available.

Any new construction or alteration must be "readily accessible and usable" to the extent that it is not structurally impracticable. All alterations and construction of public accommodations must comply with the ADAAG.

Application

If the Town operates the facilities on the property, it will need to make sure its programs are accessible. There are many methods of achieving accessibility; accessibility does not necessarily require structural change to existing buildings. However, if the Town undertakes any structural alterations or new construction, the alterations or new construction will need to comply with the technical requirements of either the UFAS or the ADAAG.

If the Town leases the facility to a private entity for operation of a recreational facility, both the Town and the private entity are responsible for compliance with the ADA. The Town would need to contract with the public entity to insure that the Town can meet its Title II obligations. To comply with Title III, the private entity will need to remove architectural barriers from existing buildings if readily achievable. If barrier removal is not readily achievable through structural alteration, the facilities must be made accessible through other readily achievable means. If the private entity undertakes any structural alterations or construction, the alterations or new construction must strictly comply with the technical requirements set forth in the ADAAG.

Excellent resources for understanding the requirements

of the ADA can be found at the United State Department of Justice website at

http://www.usdoj.gov/crt/ada/publicat.htm

In particular, I direct your attention to the links on that page for the following publications:

- ADA Questions and Answers;
- Myths and Facts;
- Title III Technical Assistance Manual;
- Title II Technical Assistance Manual; and
- ADA Guide for Small Towns.

4. **How the State Building Code applies to the property, and what effect improvements or restorations might have on the Code?**

Unless otherwise specified in the State Building Code, an existing building is required to meet and is presumed to meet all applicable building regulations in existence at the time it was constructed or altered. 780 CMR 102.5.2. An existing building may continue to be used in accordance with its permitted use and occupancy, provided that it is maintained in accordance with 780 CMR 103.0. Section 103.0 requires all buildings and structures, and systems and equipment therein, to be "maintained in a safe, operable and sanitary condition". All required service equipment, means of egress, devices and safeguards must be "maintained in good working order". The owner of the property is responsible for compliance with §103.0.

If a building is altered to change from one use group to another, or from one use to another within a particular use group, a new certificate of occupancy is required. See 780 CMR 102.2.

Any new construction or alteration of existing buildings would need to comply with the current requirements of the State Building Code.

Additionally, we agree with the Westford Building Inspector, who has advised that any alterations must comply with the requirements of the Architectural Access Board regulations set forth in 521 CMR, and if any work is done

($100,000.00), the building would need to comply with the requirements for accessible entrances and toilet areas. If the value of the work is more than thirty percent (30%) of the cash value of the building, the entire building would need to be made accessible. The Building Inspector further advised that certain types of work are exempt from these Architectural Access Board requirements, including but not limited to curb cuts, roofing, alterations to electric or plumbing systems and landscaping.

5. **Whether the applicability of the Building Code and the Americans with Disabilities Act differs depending on whether the buildings are operated by the public rather than a third party, and whether the use is public or private?**

ADA

As discussed above, the requirements of the ADA differ depending on whether the Town or a private entity operates the facility.

Unless a private entity operates the facility as a "private club", the facility would need to comply with the ADA.

State Building Code

Pursuant to 780 CMR 102.1, the requirements of the State Building Code would apply with equal force regardless of whether the Town or a private entity operates the facility. The applicable requirements of the State Building Code depend, in part, on the type of use, but there is no distinction within each use that would alter the requirements depending on whether the use is public or private.

Please note that Attorney Heather White researched and responded to issues numbered 3, 4 and 5. Therefore, if you have any specific questions regarding those responses, you should contact her directly. In addition, I am available to discuss this

matter with you.

Thank you for your attention to this matter.

Sincerely,

Elaine M. Lucas

EML/cam
Enclosures
cc: Steven L. Ledoux, Town Manager
Norman Khumalo, Assistant Town Manager